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In the Supreme Court of the United States

October Term, 1971

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

ALLEGHENY-LUDLUM STEEL CORPORATION ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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OPINIONS BELOW

The opinion of the district court (J.S. App. 13–26) is reported at 325 F. Supp. 352. The report of the Interstate Commerce Commission (J.S. App. 28–168) is reported at 335 I.C.C. 264. The Commission's order of February 18, 1970 (J.S. App. 169–179) is reported at 335 I.C.C. 874, and its order of March 18, 1970 (J.S. App. 180–183) is unreported.

JURISDICTION

The judgment of the district court was entered on March 18, 1971 (J.S. App. 27). Notices of appeal

were filed by the United States and the Interstate Commerce Commission on May 17, 1971 (J.S. App. 204–207). On July 9, 1971, Mr. Justice Brennan extended the time for docketing the appeal to August 15, 1971. The appeal was docketed on August 13, 1971. Probable jurisdiction was noted by the Court on November 9, 1971 (App. 1). The jurisdiction of this Court rests on 28 U.S.C 1253.

QUESTIONS PRESENTED

Whether the district court erred in enjoining the enforcement of certain car service rules promulgated by the Interstate Commerce Commission, which generally require that off-line freight cars be returned either loaded or empty in the direction of the railroads that own them so as to increase the availability of freight cars to their owners.

This involves the following subsidiary questions:

1. Whether the court below erred in holding that the general and pervasive shortage of freight cars on virtually all railroads is an insufficient basis for the imposition of the car service rules, in the absence of explicit findings of shortages on individual railroads, and of the financial ability of affected railroads to increase their car supply.

2. Whether the court below erred in holding that the practical necessity, recognized and provided for by the Commission, for some exceptions in the day-to-day administration of the car service rules renders the rules invalid.

STATUTE INVOLVED

Section 1(14)(a) of the Interstate Commerce Act, 40 Stat. 101, as amended, 49 U.S.C. 1(14)(a), provides:

> The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for non-observance of such rules, regulations, or practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable com-

pensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (J.S. App. 27) invalidating portions of certain orders issued by the Interstate Commerce Commission as part of its broad effort to meet the problems of freight car supply and distribution on the nation's railroads. The Commission orders here in issue (J.S. App. 167–168, 169–179, 180–183) make mandatory the observance of various rules selected from the "Code of Car Service Rules" (J.S. App. 128–145) published by appellee Association of American Railroads ("AAR") for observance by almost all railroads (App. 259). The district court enjoined the Commission from enforcing two of the rules so selected, which, in essence, would require that empty freight cars be returned, either with or without load, in the direction of the railroads owning the cars.

A. Background

For more than a century, the nation's railroads have freely interchanged loaded freight cars so that goods could be shipped from point of origin to point of destination over two or more railroads in a single freight car. Under this system, each railroad participating in the transportation receives a portion of the freight charge; in addition, a railroad hauling a freight car it does not own pays the owner a daily rental charge ("per diem") for the period the car is on the non-owner's tracks (App. 189). To provide for the return of cars to their owners after freight is unloaded, railroads as early as 1902 voluntarily adopted a "Code of Car Service Rules."[1] Substantially the same rules are now part of the AAR Car Service and Per Diem Agreement, to which virtually all railroads have become parties (App. 259).

Notwithstanding the railroads' covenants to "abide by and enforce the rules" (*ibid.*), many railroads have simply disregarded the car service rules (App. 157–159, 182),[2] particularly in times of general freight car shortage, with the result that in recent years railroads frequently received the use of their own cars on the average of less than once each month (App. 159–162, 182). The Commission has thus found it nec-

[1] See *Rule Book of the American Railway Association*, 19, 195–197 (1905).

[2] For a short period during World War I, the car service rules governing the return of freight cars were made mandatory by the Commission as to certain types of cars. See *Car Supply Investigation*, 42 I.C.C. 657; J.S. App. 61. See also pp. 19–21, *infra*.

essary periodically to issue special orders to individual carriers with respect to the return of freight cars to their owners (App. 151).

Shortly after the second World War, the Commission conducted a general investigation of freight car service and concluded that railroads as a group had failed to furnish adequate car service by not acquiring ownership of a sufficient number of general purpose freight cars to meet the needs of the shipping public. *Car Service, Freight Cars,* 268 I.C.C. 687. At that time however, it declined to impose mandatory car service rules in the belief that the problems could best be solved by leaving the matter to railroad management and that an equitable distribution of cars might be obtained through the carriers' voluntary compliance with the AAR Rules (J.S. App. 33–34).

By the 1960's it became apparent that, far from improving, the car shortage problem was in fact worsening. Between 1955 and 1964, the total number of freight cars owned by railroads in the United States declined by some 210,000, or more than 12 percent (App. 151–155). The decline in ownership of general purpose boxcars—the workhorses of the nation's car fleet—was even more precipitous, falling more than 22 percent during that 10-year period (*ibid.*). This decline in the number of cars was only partially offset by a corresponding increase in the size or capacity of the cars in use; during the same period the aggregate capacity of freight-carrying cars declined by approximately 5 percent (*ibid.*). The problem of re-

curring car shortage became the subject of congressional hearings[3] and a matter of presidential concern.[4]

In an effort to alleviate the crisis, the Commission moved upon a number of related fronts, establishing a new schedule of payment for the use by one railroad of another's cars (basic per diem);[5] adding an "incentive" element to the basic per diem charge to encourage the prompt return of equipment found to be in short supply;[6] enforcing the requirement that there be complete unloading of boxcars, free of debris and damage, to permit more prompt reuse of the

[3] See Hearings Before a Subcommittee of the Senate Committee on Commerce on S. 886, 87th Cong., 1st Sess.; Hearings Before a Subcommittee of the Senate Committee on Commerce on S. 1063, 88th Cong., 1st Sess.; Hearings Before the Freight Car Shortage Subcommittee of the Senate Committee on Commerce, 89th Cong., 1st Sess.; Hearings Before the House Committee on Interstate and Foreign Commerce on H.R. 2230, H.R. 7165, and S. 1098, 89th Cong., 1st Sess.; Hearings Before a Subcommittee of the Senate Committee on Commerce on Freight Car Supply, 91st Cong., 1st Sess.

[4] See President Johnson's remarks upon signing P.L. 89-430, May 26, 1966, published in 2 *Weekly Compilation of Presidential Documents*, p. 690.

[5] *Chicago, B. & Q. R. Co.* v. *New York, S. & W. R. Co.*, 332 I.C.C. 176, sustained on review *sub nom. Union Pacific R. Co.* v. *United States*, 300 F. Supp. 318 (D. Neb.), and *Boston and Maine Railroad* v. *United States*, 297 F. Supp. 615 (D. Mass.), affirmed *per curiam*, 396 U.S. 27.

[6] *Incentive Per Diem Charges—1968*, 337 I.C.C. 183 and 217, sustained on review *sub nom. Long Island R. Co.* v. *United States*, 318 F. Supp. 490 (E.D.N.Y.), and reversed and remanded in *Florida East Coast Ry. Co.* v. *United States*, 322 F. Supp. 725 (M.D. Fla.), appeal pending in this Court, No. 70-279.

cars;[7] and increasing the use of its emergency power to remedy critical equipment shortages.[8] In addition, the Commission has further endorsed proposed legislation to establish a federally chartered, quasi-public corporation to acquire general purpose freight cars and make them available to the nation's railroads; bills have been introduced and hearings held,[9] but no final action has yet been taken by Congress. It was in this context that the proceeding which culminated in the promulgation of the instant rules arose.

B. Proceedings Before the Commission

1. In December 1963, the Commission instituted an investigation into the adequacy of freight car ownership. In June 1964, the Commission issued an interim report finding a substantial inadequacy of ownership in more than one category of freight cars throughout the United States. *Investigation of Adequacy of Railroad Freight Car Ownership, Car Utilization, Distribution, Rules and Practices,* 323 I.C.C. 48, 60. The following month, the Commission issued a formal notice of proposed rulemaking pursuant to Section 1(14)(a) of the Interstate Commerce Act, broadening the earlier proceeding to consider the possible prescription of rules to alleviate recurring freight car short-

[7] *Consignee's Obligation to Unload Rail Cars in Compliance With Carriers' Published Tariffs* (Docket No. 35237, decided Feb. 18, 1970), review pending *sub nom. A. E. Staley Mfg. Co.* v. *United States* (C.A. No. 4-69 Civ. 459; D. Minn.).

[8] See, *e.g.*, *United States* v. *Southern Ry. Co.*, 364 F. 2d 86 (C.A. 5), certiorari denied, 386 U.S. 1031.

[9] Hearings Before the Special Subcommittee on Freight Car Shortage of the Senate Committee on Commerce on S. 1415, S. 1729, S. 1730 and S. 1731, 92d Cong., 1st Sess.

ages. 29 Fed. Reg. 11653. Preliminary information was solicited by means of a detailed questionnaire sent to all Class I railroads and to certain Class II railroads and switching and terminal companies.[10]

The proceeding was then assigned to a hearing examiner for the taking of testimony. The views of 121 witnesses were filed in the form of verified statements. In addition, certain of the affiants were cross-examined during 50 days of oral hearings, which generated nearly 6,000 pages of transcript.

To establish that there was indeed a national freight car shortage, the Commission's Bureau of Accounts introduced a verified statement based on the data for the month of October 1964 supplied by the railroads in response to the questionnaire (App. 183–184). Analyzing the data, the Bureau concluded that there was a national freight car deficiency of 111,042 cars, or 7.66 percent of the railroads' total car ownership. Many of the railroads and practically all of the shippers attested to, or at least assumed, the existence of a chronic shortage of freight cars.[11]

To help alleviate the shortage of freight cars, the Commission's Bureau of Operations urged the Com-

[10] Class I railroads are those with annual operating revenues of $5,000,000 or more; Class II railroads are those with annual revenues of less than $5,000,000. 49 C.F.R. 1240.1.

[11] For statements of railroads, see 194–195; 199–200; 221; 231; 237–238; and 241. For statements of shippers or their representatives (including some of the appellee steel companies), see App. 202; 203–204; 205; 207–208; 211; 246; 249; 267–268; 279; 280; 281; 282–284; 285; 291; 295; 301; 305; 325; and 328–329.

mission to make mandatory the observance of certain of the car service rules promulgated by the railroad industry (App. 173–181). Witnesses for some railroads also conceded that enforceable car service rules were needed. For example, a witness for the Great Northern advocated "strong measures" to combat the shortage of freight cars, including "stricter enforcement of and compliance with car service rules" (App. 190). Similarly, witnesses for the Northern Pacific and the Pennsylvania Railroad testified that the supply and utilization of freight cars could be improved through compliance with the car service rules (App. 194–195, 198).[12]

A number of shippers and their representatives expressed similar views. The American Plywood Association, for example, proposed a rule to achieve return of cars "in accordance with the present AAR car service rules", and expressed the view that the position of the industry would improve if the AAR rules were made mandatory (App. 205–206; 144–145). And a witness for the National Industrial Traffic League, while opposing the imposition of mandatory rules, admitted on cross-examination that "[i]f the carriers followed their own rules I imagine there would be less shortages in certain areas of the country than we have experienced" (App. 149).[13]

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[12] See, also, verified statements of the witnesses for the Chesapeake & Ohio Railway (App. 188–189), the Missouri Pacific (App. 192), the Boston & Maine (App. 218–219), and the New York, New Haven and Hartford Railroad (App. 234).

[13] See, also, verified statements of the Secretary of Agriculture (App. 309; 134) and of the witnesses for the Public Utility Commissioner of Oregon (App. 210; 308), the Western Wood Products Association (App. 237–238; 142–143), and the Vulcan Material Company (App. 212–215; 322–324).

Opposition to the mandatory enforcement of car service rules was expressed by the AAR and several shippers (including certain steel companies) on the grounds, *inter alia*, that increased empty car mileage and severe restrictions on loading operations would result.[14]

In January 1968, the hearing examiner filed a report and order recommending discontinuance of the proceeding and finding the statistical data on freight car ownership to be unreliable and in some instances biased (App. 24–27). The examiner further concluded that mandatory enforcement of the proposed car service rules would place undue and inflexible restraints on railroad management, and would be detrimental to efficient freight car distribution (App. 46–49).

2. In a report and order issued in August 1969, Division 3 of the Commission rejected the conclusions of the hearing examiner and order that certain of the proposed car service rules and a formula for determining the adequacy of future freight car ownership be put into effect.

The Commission analyzed in detail the data submitted by the railroads in the course of the proceeding and other data contained in periodic reports by the railroads to the Commission and to the AAR

[14] See, *e.g.*, App. 248; 250; 259–260; 268; 291; and 305.

covering the decade 1955–1964 (J.S. App. 35–53). On the basis of this analysis, the Commission found that freight car shortages of varying duration and severity have repeatedly occurred, both at times of national emergency and during yearly peak loading periods (J.S. App. 35). This evidence, the Commission concluded, showed that the railroads had failed to maintain an adequate freight car supply (J.S. App. 52–53).

The Commission also noted the low percentage of freight cars that were actually on the tracks of their owners at any given time, and observed that the percentage had been gradually decreasing in recent years (J.S. App. 54). Thus, for example, on March 1, 1966, only 27.7 percent of the nation's plain boxcars were on their owners' lines; in the preceding year, the percentage had remained mostly in the low thirties (*ibid.*). Because of the low percentage of cars on their owners' lines, the Commission found that the railroads had little incentive to purchase large fleets of cars or maintain their cars to high standards; apart from per diem income, the principal beneficiaries of such practices would be other lines (J.S. App. 55). The Commission concluded that this dislocation of cars contributes to the steadily decreasing supply of freight cars in general service—cars on which the public heavily relies (J.S. App. 55–56).

Of the several AAR car service rules selected by the Commission for mandatory observance, only the

first two are in issue here.[15] In adopting these two rules, which generally require that empty freight cars be returned, with or without a load, in the direction of the owner lines, the Commission noted that it was not attempting to improve the general utilization of freight cars, but was primarily interested in increasing the availability of cars to their owners (J.S. App. 65).

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[15] The two rules provide (J.S. App. 64):

Rule 1:

Foreign cars, empty at a junction with the home road, must be:

a. loaded at that junction to or via home rails, or,

b. delivered empty at that junction to home road, except in instances where Rule 6 [see J.S. App. 67–88] has been invoked, or unless otherwise agreed by roads involved.

Rule 2:

Foreign empty cars other than those covered in Rule 1 shall be:

a. loaded to or via owner's rails.

b. loaded to a destination closer to owner's rails than is the loading station or delivered empty to a short line or switch loading road for such loading (Car Selection Chart is designed to aid in so selecting cars for loading).

c. delivered empty to the home road at any junction subject to Rule 6.

d. delivered empty to the road from which originally received under load, at the junction where received, EXCEPT, that when handled in road haul service, cars of direct connection ownership may not be delivered empty to a road which does not have a direct connection with the car owner.

e. return to the delivering road when handled only in switching service.

Assured of greater use of their cars, the Commission reasoned, owners would then be in a better position both to acquire freight cars to meet the specific needs of their shippers and to measure more accurately their ownership requirements (*ibid.*). Moreover, enforcement of the rules would shift the responsibility for freight car shortages to the railroads with inadequate ownership, forcing such railroads to purchase new cars (*ibid.*). The Commission recognized that mandatory observance of the rules might create temporary shortages on the lines owning insufficient equipment, but concluded that the needs of the shippers affected should not be met with freight cars purchased by other railroads to serve other shippers (J.S. App. 66).

Rejecting arguments in opposition to the proposed rules, the Commission found that empty car miles will be reduced in the long run if cars are used in accordance with the rules and that the extra switching and short delays which observance of the rules might cause were outweighed by the benefits which would accrue from the quick return of cars to their owners (J.S. App. 67).

A Note to Rules 1 and 2, as adopted by Division 3 of the Commission, provided that any inequities arising in the application of the rules should be resolved by negotiations between the railroads involved. Following agreement by the parties and concurrence by the Car Service Division of the AAR, exceptions to the rules would be permitted (J.S. App. 65). Upon

petitions for reconsideration, the full Commission promulgated an additional rule—Rule 19—empowering the Director or Assistant Director of the Commission's Bureau of Operations to grant exceptions to the car service rules prescribed for mandatory observance (J.S. App. 172).

C. Decision of the Court Below

The district court enjoined enforcement of Car Service Rules 1 and 2,[16] finding three deficiencies in the Commission's report. First, although conceding that there may be substantial evidence of a nationwide freight car shortage, the district court found that the evidence does not support a finding that there are special freight car shortages on railroads owning relatively large numbers of cars (J.S. App. 19–20). The court also criticized the Commission for failing to make express findings with respect to the financial ability of railroads owning relatively few freight cars and of the shipping public to absorb new freight car capital expenditures (J.S. App. 20–23, 25). Finally, the court noted that it was conceded that there could not be complete observance of the mandatory rules and that violation of the rules could result in the imposition of criminal penalties. Since, in the court's view, the imposition of the penalties could be dependent upon a

[16] The district court's injunction (J.S. App. 27) did not affect the other car service rules selected for mandatory observance or the formula prescribed by the Commission for measuring the adequacy of freight car ownership in the future.

determination by a field representative of whether an exception to the rules should be granted, the court found that those subject to the rules were deprived of an ascertainable standard for determining the legality of their conduct (J.S. App. 25).

D. The Decision of the United States District Court for the Middle District of Florida

On June 7, 1971, after the court below had decided the present case, another three-judge district court sitting in Florida upheld the Commission's promulgation of Car Service Rules 1 and 2, expressly refusing to follow the decision here. *Florida East Coast Railway Company* v. *United States,* 327 F. Supp. 1076 (M.D. Fla.), reprinted at J.S. App. 184–203.

SUMMARY OF ARGUMENT

1. Section 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. 1(14)(a), which empowers the Commission to promulgate reasonable car service rules, was enacted in 1917 during a period of extreme freight car shortage. At that time, as now, the railroad industry had adopted car service rules governing the return of freight cars to their owners; as is also the case now, these rules were frequently ignored by the railroads. The legislative history of Section 1(14)(a) disclosures that Congress recognized that enforcement of the railroads' own car service rules would help alleviate the car shortage and fully intended, in enacting the statute, to authorize the Commission to prescribe such rules as it found appropriate for manda-

tory observance. It is in the light of this history that the "reasonable rules" standard enacted by Congress should be interpreted.

In arguing that the rules promulgated by the Commission here were indeed "reasonable", we begin with the Commission's finding that a national freight car shortage exists. Given the shortage, the Commission focused on the fact that due to the non-observance of AAR Car Service Rules 1 and 2, railroads received very little use of their own cars. The Commission concluded that enforcement of the rules would give the railroads greater use of their cars and provide an incentive for them to purchase new equipment. Proper consideration was also given to the extra switching and short delays which might result from the enforcement of the rules. The Commission was supported in its conclusion that enforcement of the car service rules was appropriate both by testimony in these proceedings and by testimony before congressional committees investigating the freight car shortage. In all the circumstances, we submit, the Commission's decision to prescribe AAR Car Service Rules 1 and 2 for mandatory observance was eminently reasonable.

2. Since the primary purpose of the Commission's orders is to increase the *supply* of freight cars, it was not necessary for the Commission specifically to find that there was a freight car shortage on railroads owning relatively large numbers of freight cars. Once the Commission determined the existence of a national shortage, it was appropriate to prescribe rules which would provide an incentive for new car purchases and

would focus the responsibility for such purchases on roads with deficient ownership of cars. Similarly, specific findings on the financial ability of railroads to purchase new equipment were not necessary. Aware of their ownership needs, railroads will be able better to justify the necessary expenditures; to the extent that compliance with the rules imposes undue financial hardship, the roads affected may apply for exceptions.

3. Finally, the fact that total compliance with the car service rules may not be possible does not foreclose the Commission from requiring mandatory observance of the rules where, as here, adequate provision is made for granting exceptions. The district court erred in concluding that criminal penalties attach to every non-excused failure to comply; proof of criminal intent continues to be a necessary element of a criminal violation.

ARGUMENT

I. THE PROMULGATION BY THE COMMISSION OF AAR CAR SERVICE RULES 1 AND 2 FOR MANDATORY OBSERVANCE WAS "REASONABLE" WITHIN THE MEANING OF SECTION 1(14)(A) OF THE INTERSTATE COMMERCE ACT

A. IN AUTHORIZING THE COMMISSION TO ESTABLISH "REASONABLE" CAR SERVICE RULES, CONGRESS ANTICIPATED THAT THE COMMISSION MIGHT FROM TIME TO TIME ADOPT CERTAIN OF THE RAIL INDUSTRY'S OWN RULES FOR MANDATORY OBSERVANCE

Section 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. 1(14)(a), known also as the Esch Car Service Act of 1917, expressly authorizes the Commission to "establish reasonable rules, regulations, and practices with respect to car service" by the rail carriers.

As the legislative history of the Esch Act makes plain, one of Congress' basic purposes was to authorize the Commission to enforce, where appropriate, the existing car service rules voluntarily adopted but frequently ignored by the railroad industry. That is precisely what the Commission has done here. The district court's holding that, even though a national freight car shortage may in fact exist, the Commission's action in this case did not meet the standards of the Act, significantly narrows the scope of the Commission's discretion to prescribe car service rules and is contrary to the broad statutory mandate embodied in the Esch Act's "reasonable rules" standard.

Enactment of the Esch Act was prompted by the severe car shortage which plagued the nation during World War I. In 1916, complaints from all parts of the country were reaching the Commission, as shippers and carriers alike struggled to meet the demands for freight cars with an inadequate car fleet. The Commission initially sought to remedy the problem by appealing to the railroads themselves for voluntary cooperation, particularly with regard to the observance of their own existing car service rules.[17] When no immediate improvement materialized, the Commission one month later instituted a formal in-

[17] See letter, dated October 13, 1916, from the Chairman of the Commission to the President of the American Railway Association (predecessor of the AAR), circulated to all member railroads as Circular No. 1736, the American Railway Association. A copy of the Circular is on file at the library of the Commission.

vestigation into the problem of car supply. *Car Supply Investigation,* 42 I.C.C. 657. After receiving evidence, the Commission issued a report finding (42 I.C.C. at 662):

> For present purposes it is sufficient to state that for some time prior to the Commission's investigation there had been a general misuse of freight cars by substantially all of the respondent carriers. The substance of these misuses was the failure to observe the then effective car service rules 1, 2, 3, and 4, which provide for the return of cars to the owning roads, stated in Exhibit A of the appendix, adopted by the American Railway Association [predecessor of the AAR], whose members include all of the principal carriers of the United States subject to the act. * * * These practices were frankly admitted by substantially all carriers, and while on behalf of some lines a desire to observe car service rules was expressed, it was stated that they could not do so unless other lines would also conform to those rules. * * *

The Commission noted that there was some "question of the Commission's jurisdiction to enter an order requiring the carriers to observe reasonable rules for the exchange, interchange, and return of cars" (42 I.C.C. at 670–671), but concluded that "in the emergency that doubt should be resolved in favor not only of the carriers who are wrongfully deprived of the use of their cars, but in favor of shippers and

of the general public" (42 I.C.C. at 674). It accordingly made the railroads' own car service rules mandatory as to certain specified types of cars, which were in particularly short supply (42 I.C.C. at 674–675). In essence, those rules, like the rules involved in this case, required that such cars be returned, loaded or empty, in the direction of the owning road.

The Commission's prescription of those car service rules was never challenged in court. Because its power in this area was unclear, however, the Commission took prompt action to secure legislation specifically authorizing it to prescribe uniform car service rules for all rail carriers. See Interstate Commerce Commission, *30th Annual Report*, pp. 67–69, 71–73, 91–92 (1916). As a result of this action, Representative Esch of the House Committee on Interstate and Foreign Commerce introduced a bill substantially incorporating the Commission's proposal.[18] After undergoing various amendments,[19] the bill emerged as the Esch Act of 1917.

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[18] H.R. 20352, 64th Cong., 2d Sess., reintroduced as H.R. 328, 65th Cong., 1st Sess. The bill is set forth in Hearings on H.R. 19546, H.R. 20256 and H.R. 20352 Before the House Committee on Interstate and Foreign Commerce ("House Hearings"), 64th Cong., 2d Sess., pp. 3, 18.

[19] The original Esch bill authorized the Commission to impose car service rules in emergencies without hearing. After extensive hearings (see House Hearings), the House Commerce Committee reported the bill for enactment substantially as introduced. See H. Rep. No. 18, 65th Cong., 1st Sess. Following enactment by the House, hearings were held in the Senate which disclosed a need for car service regulation in non-emergency periods. See Hearings on S. 636 Before the Subcommittee of the Senate Committee on Interstate Commerce

The legislative history of the Act leaves no doubt that Congress intended to authorize the Commission to prescribe mandatory car-service rules such as those already voluntarily adopted by the rail industry. Indeed, then-Chairman Hall of the Commission, testifying in support of the bill, noted that the car service rules of the American Railway Association were not observed either during periods of freight car abundance or during periods of shortage. House Hearings, pp. 15–16. He testified that the word "rules" and the term "car service" had been used in the bill to make it plain (*id.* at 19):

> * * * that what we are talking about includes what [the railroads] have been talking about, when publishing through the American Railway Association their "car-service rules," their "per diem rules," and maintaining their "commission on car service."

See also the statement of Mr. F. B. Dow, attorney for the Commission. Senate Hearings, pp. 19–20.

That Congress recognized the Commission's request for authority as one for the enforcement, where appropriate, of the carriers' own rules for returning cars to owners and supported the request is equally

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("Senate Hearings"), 65th Cong., 1st Sess., pp. 30–32. Accordingly, together with other significant changes, the bill was amended to authorize the Commission to establish at any time "reasonable rules" with respect to car service following a hearing. See S. Rep. No. 43, 65th Cong., 1st Sess. As so amended, the bill was passed by both the Senate and the House and signed into law.

clear. Both Congressman Esch (House Hearings, p. 26) and Senator Cummings (Senate Hearings, pp. 14, 22) expressed their belief during the hearings that the Commission would, under the proposed legislation, enforce the American Railway Association's own rules or establish similar rules requiring the return of freight cars to their owners. See also House Hearings, p. 82. And the Senate report recommending enactment of the bill which became the Esch Act specifically stated (S. Rep. 43, 65th Cong., 1st Sess., p. 4):

> The American Railway Association has adopted rules providing for the return of cars to the owning roads, but their rules, no doubt adopted in the best of faith, have not been observed by some of the carriers. Under the circumstances, your committee is of the opinion that the Interstate Commerce Commission should be clothed not only with authority to make the necessary rules, but also with the power to see that they are properly enforced.

The statutory discretion and power to promulgate effective and urgently needed car service rules, vested in the Commission by Congress, is here largely negated. In holding that such rules may only be enforced if the Commission finds an owner line car shortage and that non-owner lines have the financial ability to absorb new car expenditures, the district court imposed conditions having no basis whatever in the language or the history of the Esch Act.

B. THERE IS A RATIONAL BASIS FOR THE COMMISSION'S CONCLUSION THAT MANDATORY OBSERVANCE OF RULES 1 AND 2 WILL PROVIDE AN INCENTIVE TO THE RAILROADS TO ACQUIRE AN ADEQUATE FLEET OF FREIGHT CARS

The district court conceded that there may be substantial evidence of a general freight car shortage. Indeed, the record reflects extensive evidence of such a shortage as well as the Commission's detailed analysis of data covering a ten year period showing a shortage (see pp. 9–12, *supra*).[20] To place the Commission's action in proper perspective, it must be stressed that the Commission was concerned here primarily with increasing the nation's *supply* of freight cars so as to overcome the shortage, and only incidentally with improving the *distribution* of the existing car fleet (see p. 14, *supra*). That mandatory observance of AAR Car Service Rules 1 and 2 would increase the supply of freight cars, was supported by the following line of reasoning, clearly articulated by the Commission (see pp. 13–15, *supra*):

First, the evidence established that an alarmingly low percentage of freight cars was on their owners' tracks at any given time and that this low percentage was a contributing factor to the freight car shortage. Second, there is little incentive for railroads to invest in expensive new equipment[21] when often the main

[20] The Commission's documentation of the shortage fully refuted the hearing examiner's conclusion that no national shortage existed (see pp. 31–33, *infra*).

[21] Plain boxcars cost a minimum of $16,000 each, with more elaborate boxcars running as high as $37,000 (App. 201).

beneficiaries of such investments are other lines. Third, mandatory observance of the two car service rules would cause cars to be returned to their owners more quickly, would increase their availability to the owners and would thus provide an incentive for the railroads to purchase new equipment. Fourth, with greater use of their cars, the railroads would be in a better position to judge their ownership needs and the needs of their shippers. Finally, the responsibility for freight car shortages would be placed squarely on lines owning insufficient equipment. The Commission did not ignore the extra switching and short delays which might result from enforcement of the rules, but concluded that they were outweighed by the anticipated benefits from enforcement.[22]

The Commission was not alone in its conclusion that mandatory observance of the car service rules would help overcome the shortage of freight cars; as we have noted (pp. 10–11, *supra*), witnesses for the

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[22] The Commission findings are consistent with its earlier findings, made in 1947 after an investigation of freight car shortages (*Car Service, Freight Cars*, 268 I.C.C. 687, 690). There, as here, the Commission found:

> * * * At the present time the car-service rules to a large extent are suspended and disregarded by both carriers and shippers. Generally a consignee receiving a loaded shipment in a railroad owned car may now remove the lading and immediately reload the car to a point in any direction, whereas, under the provisions in the car-service rules, if it had no load for a destination in the direction of the owning railroad it would be expected to release the car and hold its out-bound shipment until another car could be funished.

railroads and shippers testified that enforcement of the car service rules would help alleviate freight car shortages. Moreover, Congress' continued investigation of the problem of freight car shortages has produced substantial testimony attesting to the nonobservance of car service rules and the need for their enforcement. For example, a witness for the Kansas City Board of Trade testified in 1959 (Hearings Before a Special Subcommittee on Freight Car Shortage of the Senate Committee on Interstate and Foreign Commerce on S. 1789, S. 1811, and S. 1812, 86th Cong., 1st Sess., p. 31):

> The experience of the trade over many years has been that the grain-carrying lines in general provide proportionately more and better cars for carrying grain than the lines in the East and South, and as the predominant movement of traffic is eastbound, the result has been that a high proportion of the cars are unloaded outside of the western territory and are then available for use by the destination lines.
>
> Under the car-service agreement of the carriers, when these cars are unloaded they are supposed to be moved back toward the home line and the imbalance corrected by delivering empty cars at the junctions with the western lines. Too often, however, experience showed that in times of general prosperity the destination lines were prone to use these western cars for their own loading, and so the imbalance continued to worsen instead of improve.

See, also, S. Rep. No. 445, 87th Cong., 1st Sess., p. 724.

Similarly, during the course of hearings on freight car shortages held in 1965, several witnesses called attention to non-enforcement of the railroads' car service rules as a factor contributing to the problems of car supply and distribution. Hearings Before the House Committee on Interstate and Foreign Commerce on H.R. 2230, H.R. 7165, and S. 1098, 89th Cong., 1st Sess., pp. 42, 64, 118, 127 and 250. See also Hearings Before a Subcommittee of the Senate Committee on Commerce on S. 179, etc., 89th Cong., 1st Sess., pp. 249, 279.

In short, the Commission properly concluded that enforcement of AAR Car Service Rules 1 and 2 was needed in the light of the national shortage of freight cars. Since, during most of this century, the AAR has been unwilling or unable effectively to enforce the rules, it was reasonable for the Commission to require their observance. Moreover, the fact that the operation of the car service rules adopted by the Commission "would resemble the practice" of the railroad industry is itself strong evidence of the reasonableness of the rules. See *Assigned Car Cases*, 274 U.S. 564, 582.

C. THE COMMISSION WAS NOT REQUIRED TO MAKE SPECIFIC FINDINGS RELATING TO SHORTAGES OF FREIGHT CARS ON INDIVIDUAL RAILROADS OR TO THE FINANCIAL ABILITY OF RAILROADS TO PURCHASE NEW EQUIPMENT

1. The district court found the Commission's report deficient in that it contained no finding that there was a freight car shortage on railroads owning rela-

tively large numbers of freight cars (J.S. App. 19–20), *i.e.*, the railroads that would benefit most from enforcement of the car service rules.[23] But such a finding is not necessary, since the determinative factor here is the existence of a national freight car shortage. Given the shortage, some railroads will have to purchase new equipment and the roads with deficient ownership of cars should bear the primary responsibility for such purchases; clearly, the responsibility does not lie with carriers who already own a sufficient number of freight cars to meet these responsibilities for handling interline traffic. The enforcement of car return rules is appropriate to assure owners greater use of their cars and to fix ultimate responsibility for the national shortage, whether or not a special shortage exists on owner lines.

The flaw in the reasoning of the court below was pinpointed by the district court in Florida, which upheld the same car service rules here in issue, when it observed (*Florida East Coast Railway Company* v. *United States*, 327 F. Supp. 1076, 1085 (M.D. Fla.); J.S. App. 201):

> The question is not, as the Pennsylvania court posed it, whether the shortage on the owner

[23] The district court expressed surprise that a seven-year study by the Commission should be climaxed by a one-sentence finding that a national freight car shortage exists (J.S. App. 18). While the Commission's statement under the "Findings" caption of its report that a shortage exists (J.S. App. 88) may be construed as its ultimate finding of fact, it is plain from even a cursory study of the report that the Commission made numerous subsidiary findings bearing directly on the necessity for and efficacy of mandatory car service rules.

> lines is more acute, but rather who should get first call on the use of cars during a shortage. Correctly stated than, we view the question as properly answered in the policy decision of the Commission to institute rules which would provide the greater usage to the owner lines.

In concluding that a finding of shortages on owner lines was necessary, the district court relied solely upon *Palmer* v. *United States*, 75 F. Supp. 63 (D.D.C.)—a decision declaring invalid the Commission's establishment of incentive per diem charges for the use of freight cars to improve the distribution of the existing freight car fleet.[24] But the *Palmer* decision, which was concerned solely with the Commission's power to prescribe per diem rates, is inapplicable here. The court in *Palmer* expressly distinguished from the Commission's challenged power to establish per diem rates the Commission's "broad" authority "to establish reasonable rules, regulations and practices with respect to car service, which includes the use, interchange and return of cars." 75 F. Supp. at 67. In finding that the Commission could not utilize the lever of incentive per diem payments in an effort to accomplish the return of cars to their owners, the court added that "[i]f the movement of empties to the owners is in the public interest for the time being the Act provides for that accomplishment by a direct requirement to that effect." 75 F. Supp. at 69.

[24] The *Palmer* holding was expressly overruled by Congress in enacting the 1966 amendment (80 Stat. 168) to 49 U.S.C. 1(14)(a). See S. Rep. 386, 89th Cong., 1st Sess., pp. 6–7; H. Rep. 1183, 89th Cong., 1st Sess., p. 6.

2. The district court also criticized the Commission for failing to consider "the capacity of the railroad industry to absorb new freight car capital expenditures" (J.S. App. 20–21).[25] But again, a specific finding is unnecessary. To overcome the freight car shortage, additional expenditure on new equipment will be necessary and the Commission can validly promulgate rules which will single out those responsible for the shortage. Once singled out, aware of what ownership levels it must maintain and assured that it will have adequate use of its own cars, a railroad, in the words of the Commission, "will be able to justify the investment required" (J.S. App. 66).[26] To the extent that funds are not immediately available, the carrier could attempt to secure financing on the basis of anticipated revenue increases or through other means. See statement of Southern Pacific (App. 200–201)

[25] The district court also faulted the Commission for failing to consider the financial effects upon the shipping public (J.S. App. 25). The agency did, however, consider the potential burden on shippers in terms of "extra switching and short delays", concluding that it was outweighed by the "overall benefit to be derived when originating lines obtain quick return of their system cars" (J.S. App. 67).

Of course, shipping rates may be increased in the future to reflect increased capital expenditures by railroads to purchase new equipment. But such expenditures are necessary to meet the demands of the shipping public for freight car service.

[26] Even railroads involved in bankruptcy proceedings have been able to justify expenditures for new equipment under 11 U.S.C. 205(j). See, *e.g.*, BNA Corporation Reorganization Reporter (Penn Central), ¶1011, for example of orders of the bankruptcy court authorizing the Penn-Central to purchase or lease caboose cars (p. 480), freight cars (p. 1256), locomotives (pp. 686, 1374); and passenger cars (pp. 347, 428).

Finally, a railroad encountering serious financial difficulty as a result of the operation of the car service rules may seek an exception from their imposition under Rule 19 promulgated by the full Commission on rehearing (see discussion at pp. 33–36, *infra*). In light of this provision, it was particularly unnecessary for the Commission to analyze the potential financial difficulties of some railroads which might result from pressures to purchase new equipment.

D. THE DISTRICT COURT PLACED UNDUE EMPHASIS ON THE HEARING EXAMINER'S RECOMMENDED REPORT

In finding the Commission's report deficient, the district court took particular note of the examiner's conclusions that there was insufficient evidence to find a general freight car shortage (App. 22–27), that the existing voluntary car service rules were working adequately to insure proper car distribution (App. 45–48), and that imposition of mandatory car service rules "would be of substantial detriment to rail carriers and shippers" (App. 33). The district court found that these conclusions were not dealt with satisfactorily by the Commission (J.S. App. 18). In fact, however, the Commission's report answers and refutes each of the examiner's critical conclusions. Thus, the Commission exhaustively analyzed the evidence before finding that a nationwide car shortage in fact existed (see pp. 12–18, *supra*). The Commission also found that the existing distribution systems were not working adequately, stating as to the system of car assignment (J.S. App. 58),

> * * * unlike the examiner, we cannot ignore evidence of waste and special privilege resulting from this method of doing business. Instances were shown where carriers held cars for prospective loading from 4 to 80 days or more even though many of these cars belonged to another railroad. * * *

Finally, the Commission, while acknowledging the disadvantages which might accrue from mandatory observance of the proposed rules, nonetheless concluded that, balanced against the resultant improved car supply, these disadvantages were not dispositive (J.S. App. 66, 67).

The appropriate treatment to be accorded an examiner's recommendation of a decision adverse to that reached by the Commission was articulated by this Court in *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 492–497, and has recently been restated in *Greater Boston Television Corporation* v. *Federal Communications Commission,* 444 F. 2d 841, 853 (C.A.D.C.), certiorari denied, 403 U.S. 923:

> The Examiner's decision is part of the record, and the record must be considered as a whole in order to see whether the result is supported by substantial evidence. The agency's departures from the Examiner's findings are vulnerable if they fail to reflect attentive consideration to the Examiner's decision. Yet in

> the last analysis it is the agency's function, not the Examiner's, to make the findings of fact and select the ultimate decision, and where there is substantial evidence supporting each result it is the agency's choice that governs. [Footnotes omitted.]

The findings of the Commission in this case "reflect attentive consideration to the Examiner's decision." The Commission thus did not err merely because it reached a contrary conclusion. See *Assigned Car Cases*, 274 U.S. 564, 580–581; *American Trucking Associations* v. *A. T. & S. F. R. Co.*, 387 U.S. 397, 412; *Illinois Central Railroad Company* v. *Norfolk & Western Railway Company*, 385 U.S. 57, 69. And, as we have previously shown, the Commission's order was properly based on the record before it and was amply justified.

II. THE ADMITTED NEED FOR EXCEPTIONS TO THE CAR SERVICE RULES, RECOGNIZED AND PROVIDED FOR BY THE COMMISSION, DOES NOT INVALIDATE THE REASONABLENESS OF REQUIRING GENERAL OBSERVANCE OF THE RULES

In addition to faulting the Commission for failing to make specific findings, the court below held that the fact that full compliance with the car service rules was not feasible also contributed to its conclusion that the rules were unreasonable (J.S. App. 25). Although the court did note that the Commission had provided

for exceptions,[27] it did not discuss the means for obtaining the exceptions other than to state that the "imposition of statutory penalties could be dependent upon a subjective determination of the field representatives of the Commission" (J.S. App. 15–16, 25).

The claim that fair administration of the rules, including the exception provisions, is not possible is answered by the position of the railroad industry itself. Though opposing mandatory prescription of the rules, the AAR conceded in the alternative before the Commission on petition for reconsideration that (App. 340):

> There is only one feasible way to operate the railroads under a mandatory system of car serv-

[27] As ultimately promulgated, the Commission orders provide (J.S. App. 64, 65, 172):

NOTES TO CAR SERVICE RULES 1 AND 2

* * * * *

(B) Inequities resulting from these rules should be resolved by negotiations between the roads involved, and exception to the rules is permitted following such resolvement and concurrence by the Car Service Division [of the AAR].

* * * * *

Rule 19—Exceptions. Exceptions to the rules (prescribed by the Interstate Commerce Commission for mandatory observance) for the purpose of further improving car supply and utilization, increasing availability of cars to their owners, improving the efficiency of railroad operations or alleviating inequities or hardships, may be authorized by the Director or Assistant Director of the Bureau of Operations, Interstate Commerce Commission, Washington, D.C.

> ice rules. The Chairman of the AAR Car Service Division must be allowed to grant exceptions to the rules whenever literal compliance would be detrimental to or frustrate the objectives of the rules, with the possible proviso that, should the Commission desire to retain overall supervision of such procedure, all exceptions granted shall be filed with the Commission by the Chairman and be subject to suspension or cancellation. Specifically, the railroad respondents request that * * * the following provision must also be prescribed as an integral part of the same set of regulations * * *.

AAR then proposed an exception provision in language substantially identical to that adopted by the full Commission on reconsideration (J.S. App. 172).[28] Indeed, the net effect of the overall exceptions procedure provided by the Commission is even more liberal than that requested by the AAR. Under the Commission's provisions, a railroad may secure relief even after a request for an exception is initially denied by the AAR Car Service Division.

[28] Compare *Assigned Car Cases*, 274 U.S. 564, 582, where this Court, in sustaining the validity of certain car service rules applicable to railroad fuel cars, relied upon the fact that administration of the rules "would resemble the practice of the Car Service Section of the Railroad Administration." The Car Service Section of the Railroad Administration was in fact the Commission on Car Service of the American Railroad Association. See, E. Coughlin, *Freight Car Distribution and Car Handling In the United States*, 309 (Association of American Railroads, 1956).

In finding the exception provisions defective, the district court apparently believed that criminal penalties would automatically attach to every instance of non-compliance with the car service rules (J.S. App. 25). But such is not the case. In most instances, it is anticipated that the railroads will either make a good faith effort to comply with the rules or apply for an exception where compliance appears to be impossible or unduly burdensome. And in instances of violations which are not excused by the granting of exceptions, the imposition of criminal penalties would still be dependent upon a showing of criminal intent on the part of the carriers. Cf. *United States* v. *Southern Railway Company*, 250 F. Supp. 759, 770 (D. S.C.), reversed on other grounds, 380 F. 2d 49 (C.A. 4).

Nor is there substance to the contention that a general rule requiring less than one hundred percent compliance is unreasonable and invalid (J.S. App. 24–25). It is well recognized that the Commission's undisputed discretion to proceed in a complex area such as car service regulation through rules of general application entails a concomitant authority to provide exemption procedures to permit consideration of special circumstances. *Permian Basin Area Rate Cases*, 390 U.S. 747, 821–822; *WAIT Radio* v. *Federal Communications Commission*, 418 F. 2d 1153, 1157 (C.A. D.C.). The flexibility afforded by waiver provisions, which necessarily assume less than total compliance with the underlying rule, is a proper element in valid

agency rule making. *United States* v. *Storer Broadcasting Company*, 351 U.S. 192, 204–205; *National Broadcasting Company* v. *United States*, 319 U.S. 190, 224–225. Moreover, as recognized in *WAIT Radio*, *supra*, 418 F. 2d at 1159 (footnote omitted), there is a practical need for rule exemptions because

> * * * a rule is more likely to be undercut if it does not in some way take into account considerations of hardship, equity, or more effective implementation of overall policy, considerations that an agency cannot realistically ignore, at least on a continuing basis. The limited safety valve permits a more rigorous adherence to an effective regulation.

Appellees and the district court may disagree with the wisdom of the Commission's conclusion that mandatory imposition of the car service rules will provide an incentive to the railroads to provide themselves with an adequate fleet of freight cars. Such "predictions of the economic future" (*American Trucking Associations* v. *United States*, 344 U.S. 298, 309), however, are for the sound judgment and discretion of the Commission. "[W]hether the Commission pursued the course of wisdom" in ordering mandatory observance of the rules is not a proper inquiry for the reviewing court (*American Trucking Associations* v. *A. T. & S. F. R. Co.*, *supra*, 387 U.S. at 412; *Northern Lines Merger Cases*, 396 U.S. 491, 513), since "[t]hese are matters left by Congress to

the administrative 'tribunal appointed by law and informed by experience'." *Assigned Car Cases, supra,* 274 U.S. at 581. In the present case, the Commission concluded (J.S. App. 62):

> * * * From the evidence of record it is obvious that voluntary observance of these rules has not been the answer to this most vexing problem. Car shortages still exist. We have given the railroad industry every opportunity to provide a solution and have stood by hopefully waiting for the desired result. It is time that some positive action is taken, and we intend to do so now.

In the circumstances, the Commission's action was reasonable and was, we submit, an appropriate exercise of its judgment and discretion in meeting its statutory responsibilities by means of administrative rule making. Cf. *Permian Basin Area Rate Cases, supra; WBEN, Inc.* v. *United States,* 396 F. 2d 601, 617 (C.A. 2), certiorari denied, 393 U.S. 914; *Federal Power Commission* v. *Texaco, Inc.,* 377 U.S. 33, 44.

CONCLUSION

For the reasons stated, the judgment of the district court should be reversed.

Respectfully submitted.

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